

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DENNIS ALLEN, MARY JANE
CRACRAFT, LELAN LITTRELL and
GLASS, MOLDERS, POTTERY, PLASTIC
AND ALLIED INDUSTRIAL WORKERS,
LOCAL NO. 41, AFL-CIO,

Plaintiffs,

vs.

LEONARD D. KRISTAL, and JOHN L.
CRARY,

Defendants.

Case No: C-1-01-159

Judge Herman J. Weber
Magistrate Judge Timothy S. Hogan

DEFENDANT JOHN L. CRARY'S
OPPOSITION TO PLAINTIFF'S MOTION
FOR EXPEDITED RULE 16
SCHEDULING CONFERENCE or IN THE
ALTERNATIVE TO EXTEND THE
DEADLINE FOR FILING DISPOSITIVE
MOTIONS

JOHN L. CRARY,

Cross-Claimant,

vs.

LEONARD D. KRISTAL,

Cross-Defendant.

JOHN L. CRARY,

Third-Party Plaintiff,

vs.

POLLY JONES, SHIRLEY MONROE,
JAMES THELAN,

Third-Party Defendants

Defendant John L. Crary, by and through his counsel, hereby respectfully submits his
Opposition to Plaintiff's motion for expedited Rule 16 scheduling conference or in the alternative
to extend the deadline for filing dispositive motions. This Opposition is based upon the

Memorandum of Points and Authorities and all other pleadings and papers on file or to be filed in support of this Opposition and upon such other and further argument as may be presented at any hearing of this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

On or about July 3, 2002, Plaintiffs filed their First Amended Complaint with this Court against Defendant John L. Crary (“Crary”) alleging breach of fiduciary duty and prohibited transactions under ERISA. Crary moved to dismiss and, on April 3, 2003, Magistrate Judge Hogan issued his Report and Recommendation denying Crary’s motion and holding that “*Plaintiffs must demonstrate what [Crary] knew and when he knew it and apply either the actual or constructive knowledge of Mr. Crary to each transaction engaged in by the Plan Administrator.*” Report and Recommendation page 5. Crary is right now in the process of finalizing his own dispositive motion since he knew nothing about the ERISA actions complained of and there has been substantially no testimony that he knew what was going on.

On or about April 16, 2003, Crary filed his Third-Party complaint for indemnity against the Third-Party Defendants Polly Jones (“Jones”), the actual named Plan Administrator; Shirley Monroe (“Monroe”), Lassen’s human resources director, who apparently knew all about Lassen’s problems; and James Thelan (“Thelan”), Lassen’s Controller, who also knew about Lassen’s problems. On or about May 9, 2003, Plaintiffs’ attorney, representing Jones and Monroe, filed a motion to dismiss Crary’s Third-Party complaint for failure to state a claim. Crary has opposed such motion since Crary can be found jointly and severally liable for all damages regardless of how little involvement he may have had.

The actual Plan Administrator for each of Lassen’s several health plans was Third-Party Defendant Polly Jones. In targeting Crary, Plaintiffs apparently decided not to sue the actual Plan Administrator of the health plans at issue. And, in a rather unique development, Plaintiffs’ counsel now represents the actual Plan Administrator responsible for these plans and responsible for

1 counsel's Plaintiff-clients' losses. These Third-Party Defendants have already tried to bring their
2 own expedited motion to move the dispositive motions cutoff date only with regard to them. That
3 having apparently been unsuccessful, Plaintiffs, through the same counsel, now try the same thing.

4 Defendant Crary's counsel has discussed with Plaintiffs'/Third-Party Defendants' counsel
5 the possibility of moving the trial date in this matter to ensure that all parties, including Third-Party
6 Defendants, have adequate rights to discovery on all relevant matters and preparation for trial.
7 However, Plaintiffs'/Third-Party Defendants' counsel resisted any changes to this court's
8 scheduling order. Now Plaintiffs'/Third-Party Defendants' counsel seeks, for a second time
9 (following the Third-Party Defendants' substantially identical motion), to cherry pick which dates
10 to change.

11 II.

12 **THERE IS NO GOOD CAUSE FOR MOVING ONLY** 13 **THE DISPOSITIVE MOTIONS DEADLINE**

14 Federal Rules of Civil Procedure, Rule 16(b), provides in part that "A schedule shall not be
15 modified, except upon a showing of good cause."

16 Third-Party Defendants, represented by the same counsel, and in their substantially
17 identical motion of a few days ago, made no showing whatsoever of good cause for continuing the
18 dispositive motions deadline. Plaintiffs now try to manufacture three purported reasons; (i) that the
19 court has not yet ruled on their motion for reconsideration; (ii) that they are missing a deposition
20 transcript, and (iii) that Third-Party Defendants' motion to dismiss has not yet been ruled on.
21 Defendant Crary submits that none of these reasons constitutes good cause for moving a deadline
22 that Plaintiffs have had full knowledge of for several months.

23 Crary submits that there is less reason to move the dispositive motions cutoff date for these
24 Plaintiffs than there was for Third-Party Defendants. At least the Third-Party Defendants roles in
25 this case are still unclear. Plaintiffs have known of the facts at issue in this matter and have had
26 ample ability to complete discovery and prepare their motion for months now. They have known
27 that the court was still considering both their motion for reconsideration and their motion to
28 dismiss. Had they really thought it appropriate to move these dates they should have had serious

1 and thoughtful discussions with Crary's counsel, not waited until the last minute as they have.

2 Now that Crary has completed discovery in accordance with the court's long-standing
3 scheduling order and almost completed his own dispositive motion, Plaintiffs want to discuss
4 moving dates, but not moving all dates in a logical fashion, but rather cherry picking the one date
5 they are having trouble meeting. This is not good cause; it is inattentiveness on Plaintiffs' part.

6 And Plaintiffs had the opportunity to request, on any basis desired, the transcript for the
7 deposition complained of. That deposition took less than two hours and contained no testimony
8 helpful to Plaintiffs. The fact that Plaintiffs apparently did not have the foresight to order the
9 transcript on an expedited basis is no reason for every other party in this matter to be affected. In
10 fact, Crary submits that these repeated attempts by Plaintiffs' counsel to have the dispositive
11 motions cutoff moved are merely cover for counsel's lack of preparation.

12 Clearly, the scheduling order may be modified in this matter by the court. But Crary
13 submits that the one date requested by Plaintiffs is inappropriate to be moved in a vacuum. Crary
14 submits that if anything is to be moved, the entire scheduling order, and not just the one date
15 chosen by counsel, should be moved so that all parties are ensured adequate time to address any
16 dispositive motions brought, give the court adequate time to consider and rule on such dispositive
17 motions before the trial date, and only then have parties prepare this matter for trial if such is still
18 necessary.

19 For these reasons, Crary respectfully submits that Plaintiffs current motion should be
20 denied, and that, if any changes are to be made to the current scheduling order, the trial date should
21 be moved, a new scheduling order should be made, and the discovery cutoff and dispositive
22 motions deadlines should be moved therewith.

Respectfully submitted,

/s/ Stephen R. Felson

Stephen R. Felson (0038432)
617 Vine Street
Suite 1401
Cincinnati, Ohio 45202
Telephone: (513) 721-4900
Facsimile: (513) 639-7011
Email: stevef8953@aol.com

Paul David Marotta, California State Bar No. 111812
Jennifer Chen, California State Bar No. 205264
THE CORPORATE LAW GROUP
500 Airport Boulevard, Suite 120
Burlingame, CA 94010
Telephone: (650) 227-8000
Facsimile: (650) 227-8001

CERTIFICATION OF SERVICE

I hereby certify that on October 14, 2003, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following.

Leonard Kristal (pro se)
107 Diablo Drive
Kentfield, CA 94904

Leonard Kristal
ldkristal@yahoo.com

David M. Cook (0023469)
Stephen A. Simon (0068268)
David M. Cook, LLC
22 West Ninth Street
Cincinnati, Ohio 45202
Phone: (513) 721-7500
Fax: (513) 721-1178

/s/ Stephen R. Felson

1 I hereby certify that the foregoing was served upon the following by ordinary U.S. Mail this
2 14th day of October, 2003 addressed as follows:

3 Leonard Kristal (pro se)
4 107 Diablo Drive
5 Kentfield, CA 94904

6 Leonard Kristal
7 ldkristal@yahoo.com

8 David M. Cook (0023469)
9 Stephen A. Simon (0068268)
10 David M. Cook, LLC
11 22 West Ninth Street
12 Cincinnati, Ohio 45202
13 Phone: (513) 721-7500
14 Fax: (513) 721-1178

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27
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Roberto Galvez
500 Airport Blvd., Suite 120
Burlingame, CA 94010
Telephone: (650) 227-8000
Facsimile: (650) 227-8001